Supreme Court, U.S.
FILED
OCT 3 2001
OFFICE OF THE CLERK

No. 01-389

IN THE

Supreme Court of the United States

JOAN H. COX, Individually, and as Widow and Personal Representative of the Estate of Brian J. Cox, deceased; and as Mother and Legal Guardian of Brian Justin-Tyler Cox, a minor,

Petitioners,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

SHARON E. PANDAK*
County Attorney
GIFFORD R. HAMPSHIRE
Assistant County Attorney
Attorneys for Respondents
One County Complex Court
Prince William, Virginia 22192
(703) 792-6620

* *Counsel of Record*

169790

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should grant a writ of *certiorari* when the Fourth Circuit affirmed, *de novo*, a district court's grant of summary judgment after determining that the use of deadly force was justified, no constitutional violation had occurred prior to the use of deadly force, there was no evidence of a genuine dispute as to a material issue of fact, and where the Fourth Circuit's decision is consistent with this Court's precedent and not in clear conflict with another court of appeals.

PARTIES TO THE PROCEEDING

Respondents differ with Petitioners' List of Interested Parties in one respect. The Prince William County Police Department should not be included as a party. Prince William County Police Department was dismissed as a party following an early motion to dismiss. Petitioners did not include the Police Department as a defendant when they filed their Third Amended Complaint that was the subject of the motion for summary judgment.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	1
Introduction	1
Proceedings Below	2
Factual Background	3
a. Factual Agreement	3
b. Factual Disagreement about a Bruise which Fourth Circuit Resolved in Favor of Petitioners	5
Reasons for Denying the Writ	9
I. The Fourth Circuit's Decision Does Not Conflict With Other Circuits On The Same Important Matter.	10

Contents

Page

II. The Fourth Circuit Has Not Acted Contrary To This Court's Precedent, Including *Graham v. Conner* 17

A. The Fourth Circuit Correctly Found That the Alleged Use of Force Did Not Violate a Recognized Constitutional Right. 17

B. The Fourth Circuit Correctly Found that There Was No Genuine Issue of Material Fact in Dispute to Send the Matter to a Jury. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Abraham v. Raso, 183 F.3d 279 (3d Cir. 1999) 10, 11, 12, 13, 15

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 10, 18, 21

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202 (1986) 22

Bazan v. Hildago County, 246 F.3d 481 (5th Cir. 2001) 13, 14

Behrens v. Pelletier, 516 U.S. 299, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996) 21

Breen v. Garrison, 169 F.3d 152 (2d Cir. 1999) ..10, 14, 15

Graham v. Conner, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) 9, 17, 18, 19, 20

Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) 21

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 11

Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, i16 L. Ed. 2d 589 (1991) 10, 21

Cited Authorities

Page

McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994) 19

Medina v. Cram, 252 F.3d 1124 (2001) 18

Mitchell v. Forsythe, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) 21

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) ... 20

Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) 15

United States v. Davis, 657 F.2d 637 (4th Cir. 1981) 7

Saucier v. Katz, __ U.S. __, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) 10, 17, 18, 21

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994) 13, 14

Sledd v. Lindsay, 102 F.3d 282 (7th Cir. 1996) 15, 16

Siegert v. Gilley, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) 16

St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995) 10

Tennessee v. Garner, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) 17

Cited Authorities

	Page
United States v. Davis, 657 F.2d 637 (4th Cir. 1981)	7
Williams v. Bramer, 180 F.3d 699 (5th Cir. 1999)	18
Wilson v. Layne, 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999)	16
United States Constitution:	
Fourth Amendment	1, 2, 18
Statutes:	
28 U.S.C. § 1983	1
42 U.S.C. § 1983	1, 2
Rule:	
Fed. R. Evid. 404(b)	7

STATEMENT OF JURISDICTION

Respondents do not dispute the Petitioners' Statement of Jurisdiction. For the reasons set forth herein, Respondents believe that this Court should not exercise its discretion in this case and grant a writ of *certiorari*.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Fourth Amendment to the United States Constitution and 28 U.S.C. § 1983. In the district court, Petitioners raised issues of State law but abandoned those in their Petition.

STATEMENT OF THE CASE

Introduction

This is a claim of excessive use of force brought under the Fourth Amendment of the Constitution and 42 U.S.C. § 1983[1]. The issue was whether Respondents County and Police Officers violated the constitutional prohibition against use of excessive force in shooting a man who, during their investigation of a suspected burglary in progress, made no response to repeated announcements and attempts to rouse him, then suddenly pointed a previously-concealed rifle at an officer who was next to the bed.

---

1. Petitioners made claims under State law which were dismissed by the district court and not pursued in the court of appeals or here.

Proceedings Below

As required, the Fourth Circuit reviewed the district court's grant of summary judgment *de novo*. It found that there was no genuine issue as to any material fact and that the Respondent Officers' conduct did not, as a matter of law, violate the Fourth Amendment. Specifically, the court of appeals found that the use of deadly force by Officers Ford and Harman was a reasonable response to an immediate and serious threat to their safety. Pet. App. 11a. It held that there was no evidence beyond mere speculation that the Officers used excessive force prior to the use of deadly force and that an officer striking a person's foot was not an unconstitutional use of force under the undisputed circumstances extant. *Id.* at 10a. Because the Court found no underlying constitutional violation, it determined that it was unnecessary to reach the issue of qualified immunity. *Id.* at 11a. The court affirmed the dismissal of the claims against the other Respondents in the absence of any underlying use of excessive force.[2]

The district court had previously dismissed the Fourth Amendment violation claims under § 1983 on the grounds that the Officers were entitled to the protection of qualified immunity and also because it found no constitutional violation. It dismissed Petitioners' derivative claims against Respondents Lt. Schaul, Chief Deane and the County. Pet. App. 23a. It also found Plaintiffs did not establish a *prima facie* case against these Defendants for failure to supervise or train. Pet. App. 24a-25a. Finally, for various good reasons, the district court dismissed all of the State law claims. Pet. App. 25a-30a.

---

2. No credence should be given to Petitioners' insinuations about the District Court. Pet. 10-11. Clearly, Petitioners do not agree with that court's holding because it concurred with Respondents' motion for summary judgment.

The Fourth Circuit properly found that the Officers' actions under the instant circumstances did not constitute a clear constitutional violation and that the inferences by Petitioners are not material facts in dispute and, therefore, summary judgment was proper. Respondents believe that this Court should deny the Petition.

Factual Background

a. Factual Agreement

Petitioners' Petition contains assertions that are unsupported by any evidence. For example, Petitioners' Question Presented sets forth a bizarre proximate cause type analysis, based on speculation, that fails to take into account Petitioners' admission that the Police were justified in shooting their decedent when he pointed a rifle at them as they investigated a burglary in progress and Petitioners' admission that their decedent failed to respond to repeated Police announcements. Pet. 5, 6; Also Petitioners' expert at JA 654-55.

Respondents incorporate in their Statement of the Case the facts set forth in the Fourth Circuit's opinion below and, where there is conflict, urge their adoption over that of Petitioners. Respondents do not concur with every fact assumed by the Fourth Circuit, however. That court was required to look at the facts in the light most favorable to the Petitioners. Pet. App. 8a. Most relevant to Petitioners' argument before this Court, the Fourth Circuit assumed that decedent Cox had a bruise on his foot. The court found that no evidence, beyond mere speculation, to suggest that Harman caused the bruise through the application of unconstitutional excessive force. Pet. App. 10a.

Petitioners make much of the need for courts on summary judgment to consider the fact intensive nature of an excessive use of force analysis. Therefore, Petitioners' substantial agreement with most of the facts in this case must be highlighted. Pet. 7. Importantly, Petitioners concur with Respondents as to the material facts *occurring before and after* Petitioners allege that Officer Harman struck Cox on the foot causing a bruise. Pet. 4-7.

Petitioners concur that Police Officers Ford and Harman, as well as Officer Jones, entered the Cox townhouse to investigate a burglary in progress as the result of a neighbor's call. Pet. 4. Petitioners agree that the Police gave three announcements and warnings before entering with canine to search.[3] They do not dispute that, when the Police searched upstairs, the Officers did not know the identity of the unresponsive man (Cox) they saw laying partially covered on a bed upstairs. *See* Pet. 5-6. Petitioners acknowledge that the Officers gave numerous warnings and announcements in attempts to rouse Cox and that Officer Ford's canine was barking within two feet of Cox's head. Pet. 5. Petitioners concur that, only after the Police shouting and canine barking failed, did Officer Harman make a movement toward Cox's foot. *Id.*

Moving forward in time to Cox's actions *after* Harman allegedly struck Cox's foot hard enough to cause a bruise, Petitioners concur with Respondents that Cox then came off the bed to a seated position pulling a rifle from underneath the covers. Pet. 6. They do not deny that Cox had had the loaded rifle concealed. *Id.* They concur that Cox failed to drop the rifle when

---

3. There is no suggestion that the Police were not proceeding in a deliberate manner. The warnings were overheard by neighbors. JA 191, 221.

told to by Officer Ford and that he continued to point the rifle at Officer Ford who was standing next to him by the bed. *Id.* Petitioners do not dispute that Officers Ford and Harman were justified in shooting Cox at this point in self-defense.

b. Factual Disagreement about a Bruise which Fourth Circuit Resolved in Favor of Petitioners

Petitioners argue with the facts encompassing an instant in time. They claim from a picture taken by their private investigators that, contrary to an independent medical examiner's report, a bruise existed on Cox's foot at the time of the autopsy. Petitioners' claim of excessive force rises and falls on an alleged bruise to their decedent's left foot. *See* Pet. 18. They build inference upon this speculation and conclude that the yell[4] which the Officers heard from Cox was a response to pain or being startled as he awakened from sleep, and, therefore, Harman "whacked" Cox on the foot during the instant in time before Cox came off the bed with a rifle pointed toward Officer Ford. Pet. 19, 9a; JA 237-238.

Petitioners' sole basis for seeking a writ is speculation that a bruise indicated that Harman recklessly or aggressively struck Cox on the foot with a police flashlight. While Petitioners presented no credible evidence of a bruise and the court was not required to credit inference and speculation, the Fourth Circuit gave Petitioners the benefit of the doubt and *assumed a bruise on Cox's foot*. Pet. App. 10a. This was more than Petitioners were due, even under a summary judgment standard.

---

4. Officer Harman declared that the man yelled "AHHHH" (JA 223), an utterance which rather indicated offensive action in the tradition of the movie character "Rambo," which is more consistent with the sudden manner Cox rose up with a previously concealed rifle.

Because Petitioners make much of this bruise issue in their Petition, Respondents digress to show what little evidence Petitioners presented in this regard. The "bruise" did not appear in the autopsy performed by an independent State Medical Examiner. JA 240-52. Petitioners' assertion is based solely on a photograph taken by their private investigators. The photographers had no medical training to know whether what they were looking at was a bruise or some other medical condition or phenomenon typically associated with dead bodies. JA 474-78. Petitioners' medical expert, Dr. Jack Daniels, was not present at the autopsy and offered his opinion based only on the same photograph. JA 649-650.

Contrary to Petitioners' assertions, Dr. Daniels did not opine that what he saw in the photograph was necessarily a bruise. At his deposition he agreed that the picture was also consistent with other things, such as a birthmark, or varicosity. JA 649-50. The alleged bruise was not large as alleged at Pet. 7. Dr. Daniels indicated that any such bruise would have been made by mild or moderate force, *at most* (not severe force). JA 652-53 (emphasis added). He admitted that any blunt impact could have been delivered by Cox's other undisputed activities on the night in question. JA 651.

Officers Harman's and Ford's statements do not conflict about whether Harman touched Cox, so as to create "sufficient evidence for a jury to find that Harman struck Cox with substantial force and that that sharp blow was the catalyst for the events that led to Mr. Cox's death." Harman swears that he "reached over to tap or touch the bottom of the man's right foot in order to get a response." JA 223. Officer Ford says Harman's movement "was not a forceful, quick movement, but one that was very slow and methodical." JA 214, 269. Petitioners admit that Harman reached out toward Cox's foot because the Officers

had been yelling at Cox who was unresponsive. Pet. 6; JA 430.[5] They resort to suggesting that Harman fabricated his affidavit because, until then, he did not indicate which of Cox's feet he intended to or did touch. Pet. 8.[6] Yet no one, including Petitioners' counsel, in deposing Harman, previously asked him which foot he touched or intended to touch. Officer Harman's statements that he was focused on a colored tattoo (which the autopsy shows was only on Cox's right leg) are consistent with the undisputed physical evidence that Cox was laying on his left side with his feet on the bed and Harman's previous statements. JA 223, 431, 238, 249.[7] Petitioners' similar lame attempt to set up inconsistencies with Officer Ford's statements are defeated by the Officers' admission that Harman intended to touch Cox's foot to try to rouse Cox. It is a total leap from this for Petitioners to conclude without evidence that Officer Harman struck Cox with excessive force, much less that he did so recklessly or aggressively.

---

5. There is no evidence that Officer Harman struck Cox's foot aggressively or out of frustration as alleged by Petitioners. Pet. 6.

6. Petitioners' statements about Officer Harman being untruthful in the past are a red herring, not a basis for sending this matter to trial on whether or not he used excessive force in touching or attempting to touch Cox. An incident of some 9 years earlier for which Officer Harman received harsh discipline would not be admissible evidence under Fed. R. Evid. 404(b) and has no probative value. *See also United States v. Davis*, 657 F.2d 637, 639 (4th Cir. 1981). The allegations about Harman's statements on two other incidents are unfounded and again not probative of the issue of whether he struck Cox. JA 433-435.

7. A strike to the left side of the foot would have been an extremely awkward and improbable movement under the circumstances.

Petitioners repeatedly claim that Cox was asleep before Harman touched him, presumably to draw an inference that, Cox was harmless and rose reflexively. Pet. 5. Again, however, Petitioners presented no evidence, just inference. *See id.* The Fourth Circuit also assumed this as a fact favorable to Petitioners. It, however, concluded that even a man who had been sleeping is not justified in pointing a previously concealed rifle at the Officers; and that the Officers may use deadly force to protect themselves. Pet. App. 11a.

Finally, Petitioners herald Cox as the homeowner. Whether the Officers could have known that Cox was the homeowner at the time of the incident is irrelevant. It was material that in the course of investigating a suspected burglary, the Officers could not rouse Cox and, when Officer Harman tried to, Cox pointed a rifle at Ford and would not drop it.[8] Petitioners do not deny that the person who presented a life threat to Officer Ford was the homeowner Cox. Petitioners are never so outrageous as to argue to this Court that the pointing of a loaded rifle by Cox at Officer Ford is a proper response to a strike on the foot. Petitioners concede that the Officers were justified in shooting Cox once he rose up out of the bed with a rifle pointing at Officer Ford's chest.

---

8. Similarly, the allegations regarding Lt. Schaul are specious. There was no evidence that Schaul knew that Officer Harman or Ford was likely to unconstitutionally shoot someone in the Cox residence. The Deadly Force Review Board concluded that Officers Ford and Harman's use of force was within policy. JA 189.

REASONS FOR DENYING THE WRIT

The question presented by Petitioners is whether the Fourth Circuit and lower court improperly "stripped" the jury, as factfinder, from determining whether Respondent Police Officers acted in an objectively reasonable manner in using non-deadly force to strike Cox on the foot, which they claim caused Cox to point a rifle at the Officers. Pet. 4. The force which Petitioners question is not the Officers' use of deadly force in self-defense, when decedent Cox pointed a rifle, but rather Officer Harman's effort to rouse Cox by touching, tapping or striking his foot hard enough to cause a bruise. Importantly, the material circumstances surrounding this alleged action were undisputed.

The Court should deny this writ because the undisputed circumstances surrounding any strike by Harman undercut a claim of conflict between the Fourth Circuit and the Second and Third Circuits. Petitioners do not demonstrate that the Fourth Circuit acted contrary to this Court's precedent in *Graham v. Conner*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), or that there is a lack of clarity for deciding cases such as this one. The Fourth Circuit properly found that there was no constitutional violation even if Office Harman struck Cox. This Court has reserved this question of law to the judge on summary judgment where, as here, no material dispute of fact regarding the application of force exists.

I.

THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER CIRCUITS ON THE SAME IMPORTANT MATTER.

Petitioners contrive an argument that the Fourth Circuit has acted inconsistently with the Second and Third Circuits in its ruling, and that this Court should take jurisdiction to resolve a conflict among the circuits. Petitioners argue that the Second and Third Circuits have better apportioned the roles between judge and jury by sending the issue of objective reasonableness to the jury. The facts of this case are very different from those at the summary judgment stage in *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) and *Breen v. Garrison*, 169 F.3d 152 (2d Cir. 1999).[9] There is no conflict.[10]

---

9. Petitioners' citation to cases in other circuits in their footnote 2 is similarly unhelpful. Pet. 13-14. Respondents particularly note that the First Circuit's opinion in *St. Hilaire v. City of Laconia upheld* a district court grant of summary judgment. 71 F.3d 20 (1st Cir. 1995)

10. Furthermore neither of these courts had the benefit of the later decision of this Court in *Saucier v. Katz*, __ U.S. __, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). If anything, the Third Circuit analysis in *Abraham*, differs with this Court in *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) and *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) to the extent that it suggests that more cases involving excessive use of force should be determined at trial instead of being resolved on motion where as a matter of law there is no constitutional violation, where there is no issue of material fact in genuine dispute, or where qualified immunity applies. If the Second and Third Circuits (Cont'd)

Petitioners argue that *Abraham* dictates that "reasonable inquiry should be left to the jury in most cases." Pet. 13 and 15. The Court in *Abraham* only said that cases in which there is a question of reasonableness "frequently" go to the jury to determine how specific circumstances would affect an officer's judgment. *Abraham* at 290. That court called it a "sensitivity to context." *Id.* Unlike in *Abraham*, however, the parties know and agree to the context in which the Officers were functioning in the instant case. Petitioners just want a different decision.

In *Abraham* there was a strong disagreement as to the context of the officer's claim of the need to use deadly force. The court found enough physical evidence to cast doubt on the officer's testimony that she was at risk of being hit by the decedent's car and that Abraham posed an immediate threat of physical harm to her or the public. 183 F.3d 279. "Relying on various pieces of physical evidence, the estate argues that the officers inflated the damage to the Mustang and hence the speed Abraham was driving, and the estate maintains that cars were not parked immediately beside Abraham's car as Raso suggested." 183 F.3d at 285. A proper reading of the physical evidence, the estate argued, deflates the charge that Abraham was driving recklessly and threatening lives. More importantly, physical evidence showed that Raso's shot went through the driver's side window, not the front windshield, as Raso claimed in her statement on October 31, 1994. 183 F.3d 284. Autopsy

---

(Cont'd)

have misunderstood or applied this Court's instructions in its previous rulings, the court should not use this case to address them. Also the conclusion from *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), does not apply (Pet. 20). In the instant case there was no conflict in evidence about the nature of the threat which the Officers faced or in the factual sequence since the Fourth Circuit assumed facts in favor of Cox.

photos supported plaintiffs' version of the facts and bystanders saw the female officer to the side not the front of the car. *Id.* at 285. The Third Circuit was concerned that physical evidence together with inconsistencies in the officer's testimony raised credibility determinations that could not be made on summary judgment. 183 F.3d at 294.

Extensive discovery in the instant case revealed no equivalent physical evidence or inconsistencies concerning the Defendant officers' announcements and other verbal attempts to arouse Cox prior to the application of any force to his foot.[11] Here by contrast, the Fourth Circuit affirmed summary judgment that the officers' use of force was reasonable precisely because it was undisputed that such force was applied only after the Officers made repeated unsuccessful verbal attempts to rouse Cox during the investigation of a suspect burglary in progress. Pet. App. 10a. These circumstances were truly undisputed from Petitioners' responses to requests for admission as well as the uncontroverted statements of the Officers. *See* JA 195, 221-22.[12] In their Statement of the Case here, Petitioners again concede that: (1) Defendant officers were investigating a burglary in progress and (2) that the officers made repeated verbal attempts to rouse Cox, including from inside the bedroom. *See* Pet. 4-6.

---

11. One can reasonably question whether this act can be described as "force" in the routine sense. The Officers only stated that Officer Harman may have touched or tapped Cox's foot by a slow methodical movement. JA 214, 264, 672-73.

12. Petitioners admitted in their responses to requests for admissions that Cox made no response to the officers even though a police canine barked less that two feet from Cox's head. JA 195-196.

No physical evidence contradicted that Cox's failure to respond to repeated warnings and announcements. No evidence supports Petitioners' assertion that Officer Harman struck Cox's foot with excessive force under the circumstances. As set forth above, assuming a bruise, caused by Harman — and not by one of Cox's other evening activities — Respondents' medical expert opined that the amount of force necessary to cause such a bruise would have been mild or moderate, *at most*. JA 652-53. Not even a scintilla of evidence supported Plaintiffs' assertions and the Fourth Circuit was exceedingly generous in assuming for the purpose of its opinion that there was at all. P. 10, *supra*.

The court of appeals in *Abraham* examined the circumstances just before Raso shot, i.e. the side or front of the car, the space between the cars, the degree to which Abraham was driving recklessly. In doing so the Court used the same analysis as the Fourth Circuit in the instant case: that the use of force must be reviewed in the totality of circumstances, and relate to the circumstances existing a moment before the force is applied, not to those that 20-20 hindsight shows to have later unfolded.[13]

One similar fact between *Abraham* and this case is that the decedent would have been a witness if he had not died. Petitioners call upon the *Bazan v. Hildago County* decision to state that the testimony of interested witnesses should be viewed skeptically, as a self-serving account.[14] Pet. 17; 246 F.3d 481, 492 (5th Cir. 2001).

13. The Fourth Circuit is not among the circuits that disregard pre-seizure conduct — here pre-seizure conduct was examined by the Fourth Circuit as it was in *Abraham*, pre-seizure conduct of both officers and Cox was undisputed. The officers made announcements as part of a suspected burglary in progress and Cox did not respond.

14. Petitioners cite *Scott v. Henrich* for the same reason but in that case the court only indicated that courts on summary judgment

(Cont'd)

Importantly, *Bazan* does not hold that the court cannot use a "self-serving account" but only that it must be scrutinized and looked at it with particular care. *Id.* The Fourth Circuit did so here; all material facts regarding the application of any force were agreed to, and where there was a significant difference (as with respect to the existence of a bruise or whether Cox was sleeping) the court chose the non-moving parties' version.[15]

The Second Circuit in *Breen v. Garrison*, reversed a trial court determination of summary judgment because the parties' versions of the material facts, regarding the amount of force and extent of injuries, differed markedly on these issues. 169 F.3d 152, 153 (2d Cir.1999). Breen alleged that, during a proceeding before a magistrate on a traffic violation, the trooper jumped on his back and yanked his head and neck; pushed his face into the table; intentionally tightened the handcuffs; hit him and spit in his face. The decision in *Breen* makes no sweeping statement about the role of the court at summary judgment. It simply states that the "parties' versions of the material facts differ markedly on these issues" and precludes summary judgment on the defense of qualified immunity. *Breen* at 153.

By contrast, in the instant case there is no dispute on the material facts. The Fourth Circuit assumed, as alternative grounds for affirming the district court grant of summary judgment, that

---

(Cont'd)
should be cautious, not that summary judgment should be denied, when the person who was subjected to a use of force is not available to testify. 39 F.3d 912, 915 (9th Cir. 1994).

15. Again, this was a gift to the Petitioners because there really was no credible evidence of a bruise, but only of a bluish discoloration in a Polaroid photograph.

Officer Harman hit Cox hard enough on the foot to cause a bruise. Discovery had revealed no injury to Cox prior to the moment he pointed a rifle at Officer Ford and the Officers shot him in self-defense. There was no dispute as to the amount of force that would be necessary to cause a small bruise. The Fourth Circuit also had undisputed circumstances prior to Harman's action: Cox was unresponsive while the Officers were conducting an investigation of a suspected burglary in progress, giving numerous and loud warnings both outside the house and inside, including in Cox's bedroom.

Separate from *Abraham* and *Breen*, Petitioners cite *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994) and *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), for their conclusion that Officers Ford and Harman provoked a use of deadly force. Again neither case stands for a proposition which is useful in the analysis of the instant case because of the dramatic differences in the facts available to the respective courts at the summary judgment stage. *Rowland* involved a scuffle arguably initiated by a police officer on a citizen over a lost $5 bill. 41 F.3d at 174. The investigation of a suspected burglary in progress and attempts to arouse a non-responsive person (Cox) are very different from the facts presented in *Rowland*. Importantly, Rowland did not involve a split second judgment regarding the use of deadly force in response to a deadly threat.

Petitioners ignore that *Rowland v. Perry* demonstrates that the Fourth Circuit will let an excessive use of force case go to the jury when there is some evidence to support Plaintiff's version of a case and, when the court has determined that no reasonable officer could have believed his conduct to be lawful in light of the circumstances. *Id.* It should also be noted that the Second Circuit in *Abraham v. Raso* cites *Rowland* for the premise of looking at all of the circumstances in evaluating objective reasonableness. *Abraham* at 292.

Furthermore, unlike in *Sledd*, where the Court of Appeals found a failure to knock and give an announcement before the police battered down plaintiff's door, the Officers here gave three warnings before entering the Cox house with canine and numerous announcements thereafter, including right next to Cox. Pet. 5; JA 211-12, 223. Also, unlike in *Sledd*, where the officers were not carrying visible insignia, the Officers here clearly made themselves known as police officers. Pet. 5; JA 192, 209-214, 218-222, 226-228.

The Fourth Circuit is not in conflict with the Second or Third Circuits in holding that the application of mild or moderate force under the circumstances presented here is objectively reasonable, there being no facts from which a reasonable juror could find for the plaintiff. Petitioners postulate without support that a decision by the Supreme Court in this case would affect a large number of cases regarding excessive force. Pet. 4. Petitioners would have this Court adopt a standard contrary to the established precedent and a rule that cases involving mere speculation should go to trial. This Court has a long precedent of stating that — for the public good — such cases should not go to trial. Respondents should be spared, not only unwarranted liability, but also the unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit. *Wilson v. Layne*, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 827, 119 S. Ct. 1692 (1999), quoting *Siegert v. Gilley*, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991).

II.

THE FOURTH CIRCUIT HAS NOT ACTED CONTRARY TO THIS COURT'S PRECEDENT, INCLUDING *GRAHAM v. CONNER*

No conflict exists between the Fourth Circuit analysis in this case and that of this Court.

A. The Fourth Circuit Correctly Found That the Alleged Use of Force Did Not Violate a Recognized Constitutional Right.

Even if Petitioners did not concede that the use of deadly force by Officers Ford and Harman was reasonable once Cox pointed a rifle at Officer Ford and refused to drop it after warning by Ford, *Tennessee v. Garner* dictates that the Officers had a right to protect themselves from this undisputed threat of death or serious injury. 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985). Petitioners concede that the officers' use of force in shooting Cox once he pointed a rifle at Officer Ford was justified. This application of force clearly is objectively reasonable under *Graham v. Conner*. 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).

The alleged use of force by Officer Harman to touch or strike Cox's foot prior to the shooting was non-deadly force. The Fourth Circuit appropriately considered first whether this act violated a clear constitutional right and concluded properly that it did not. Based on this Court's recent decision in *Saucier v. Katz*, this is the first query that must be addressed as a matter of law by the judge not jury. __ U.S. __, 150 L. Ed. 2d 272,

121 S. Ct. 2151 (2001).[16] Petitioners have at no time identified to this or any other court what right of Cox was violated.[17] They have simply referenced the Fourth Amendment. They cite no law or opinion of this court or otherwise that would indicate to Officers Harman and Ford under these circumstances that they could not have attempted to rouse or ascertain the condition of an unresponsive person during their investigation of a burglary by applying mild or moderate force to the person's foot. This court in *Saucier* held that only after making a determination that a clear constitutional right has been violated should further inquiry be made as to whether the actions of the officers in using force were objectively reasonable. 150 L. Ed. 2d 272.

Petitioners never posit how the Fourth Circuit failed to follow the criteria in *Graham v. Conner*. The Fourth Circuit, mindful of the direction of this court in *Graham*, conducted a Fourth Amendment analysis.[18] The Court of Appeals analyzed the actions

---

16. Petitioners footnote *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999) and *Medina v. Cram*, 252 F.3d 1124 (2001). Pet. App. 20. The import of these cases to Petitioners' argument is unclear since they clearly indicate that whether a constitutional violation has occurred is solely a question of law which must first be established; a premise which neither the Fourth Circuit nor Respondents dispute. The court in *Medina* also cites to this court's opinions that the "purely legal question" raised by a qualified immunity defense should be resolved at the earliest possible stage of litigation.

17. *See Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 530, 107 S. Ct. 3034 (1987).

18. The court indicated that because it found no violation of the Fourth Amendment and declined to reach the issue of qualified immunity that it not need to address whether the tests for qualified immunity and reasonableness merged, which was before this Court in *Saucier*.

of Officers Harman and Ford in the context of "circumstances that are tense, uncertain, and rapidly evolving." Pet. App. 9a, citing *Graham* at 397.[19] It rejected the specific armchair analysis that Petitioners seek here and judged reasonableness, as directed by *Graham*, "from the 'perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight.' " Pet. App. 9a, citing *Graham* at 396.

The Fourth Circuit held that the touching of Cox's foot was appropriate to ascertain Cox's condition.[20] It concluded that the Officers' use of deadly force was a response to an immediate and serious threat to their safety and reasonable under the standard set forth in *Graham*. Pet. App. 11a. Applying this standard, it found that even if one assumed Harman struck hard enough to cause bruise, his actions were objectively reasonable. The Fourth Circuit, therefore, properly noted that it could not conclude that "striking Cox on the foot to provoke a reaction was unreasonable under the circumstances." Pet. App. 10a.[21] The Court of Appeals was, therefore, making precisely the

---

19. Petitioners' speculation about the "alleged" bruise incident should not cloud the salient legal issue that Officers Ford and Harman were faced with an impossible choice that had to be made in a "flickering of an instant." *McLenagan v. Karnes*, 27 F.3d 1002, 1009 (4th Cir. 1994).

20. Petitioners complain that the Fourth Circuit conclusion rested on its determination that there was no constitutional violation and, therefore, did not address the issue of qualified immunity. Pet. 12.

21. Notably, the relative use of force allegedly employed in the instant case and single bruise injury pales compared to the application of force utilized by the police officers on a man that they later determined to be a diabetic who had committed no crime in *Graham v.Conner*, resulting in multiple injuries. 490 U.S. 386, 390, 104 L. Ed. 2d 443, 451.

determination required by *Graham* when it stated, "we can't conclude that striking Cox to provoke a reaction was unreasonable." such as to constitute a constitutional violation. Pet. App. 10a.

Petitioners fault the Fourth Circuit for assuming the bruise and not inquiring further as to whether there were reasonable alternative actions which the Officers might have taken. They cite no fact to indicate that the use of other alternatives was appropriate in light of the Officers' uncertainty as to Cox's identity. *See* Pet. 21. They cite no law that establishes as a general matter that it is a constitutional violation not to follow a particular police procedure.[22] This court in *Graham v. Conner* did not set forth a standard which would compel police to do so, in fact it discourages such Monday morning quarterbacking or the use of 20-20 hindsight to evaluate police actions. 490 U.S. 386, 396-7, 104 L. Ed. 2d 443, 455-6.

Petitioners trivialize the tense and uncertain circumstances of investigating a suspected burglary in progress in a townhouse and encountering of a non-responsive half-dressed individual. They suggest that the Officers should have taken an armchair to review courses of action. Pet. 18, 21. They are either naïve or make a mockery of the exigencies of police work. The absurdity of this suggestion is self-evident from Cox suddenly pulling a *concealed* rifle from under the covers and pointing it at Officer Ford.

Petitioners infer that *Graham* requires a jury and not the judge to determine whether an officer's actions are objectively reasonable. This Court did not deal with that issue in *Graham*. To the contrary, on several occasions, this Court has pointed to

---

22. *See Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994).

the public policy aspects of resolving issues of qualified immunity long in advance of trial, at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 595, 112 S. Ct. 534 (1991); citing *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).[23] Qualified immunity is an entitlement not to stand trial, not a defense from liability. *Saucier v. Katz*, 121 S. Ct. 2151, 2156, citing *Mitchell v. Forsythe*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). This court noted in *Behrens v. Pelletier* that "*Harlow* [*v. Fitzgerald*] adopted this criterion of 'objective legal reasonableness,' rather than good faith, precisely in order to 'permit the defeat of insubstantial claims without resort to trial.' " 516 U.S. 299, 306, 133 L. Ed. 2d 773, 783, 116 S. Ct. 834 (1996).

It should finally be noted that Petitioners conceded in their brief to the Fourth Circuit that there is no derivative liability for Respondents Lt. Schaul, Chief Deane and Prince William County where there is no underlying constitutional violation. Plaintiffs' Brief 53-55.

B. The Fourth Circuit Correctly Found that There Was No Genuine Issue of Material Fact in Dispute to Send the Matter to a Jury.

The Court of Appeals found that mere speculation or the building of one inference upon another is insufficient to create a genuine issue of material fact and, therefore, summary judgment for Respondents was appropriate. Pet. App. 7a and 10a.

---

23. "Our cases establish that qualified immunity shields agents . . . from suit for damages if 'a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly establish law and the information the [arresting] officers possessed.' "

This court has made clear that if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202 (1986). The mere existence of a scintilla of evidence in support of a non-moving party's position is insufficient for the case to proceed to a jury; there must be evidence upon which a jury could find by a preponderance for that party. 477 U.S. at 252, 91 L. Ed. 2d at 214.

Petitioners claim that a finder of fact could have disbelieved the Officers and found their conduct unreasonable. But this assertion is fallacious because: (1) even if one disbelieves the Officers, the bruise is still only a small injury caused by mild or moderate force, at most; (2) the circumstances surrounding the application of this mild or moderate force were undisputed; and (3) they would have the jury apply a 20-20 hindsight of the police using different procedures. Finally, Petitioners give no rational alternative to shooting Cox once he presented the undisputed threat with a rifle and refused to drop it.

Speculation alone should not be a reason to so burden the public. A matter should not be sent to a jury to allow a Plaintiff to place inference upon inference in hopes that it can get lucky in confusing a jury. This Court should, therefore, not further prolong this matter. Consistent with this Court's dictates in *Anderson*, this Court should remove the cloud of this litigation from these Officers and the public body and deny the writ.

CONCLUSION

The Fourth Circuit's ruling was in accord with this Court's precedent and not in conflict with decisions from the Second and Third Circuits. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

SHARON E. PANDAK*
County Attorney
GIFFORD R. HAMPSHIRE
Assistant County Attorney
Attorneys for Respondents
One County Complex Court
Prince William, Virginia 22192
(703) 792-6620

* *Counsel of Record*